

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

Application 14-04-013
(Filed April 11, 2014)

And Related Matter.

Application 14-06-012
(Filed June 17, 2014)

**COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES
ON THE PROPOSED DECISION ON MOTION TO WITHDRAW
APPLICATION TO TRANSFER CONTROL**

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Subject Index

1. The Commission should not grant the Joint Applicants' Motion to Withdraw without reaching the merits of the consolidated applications of the Joint Applicants to determine if the transaction is in the public interest.

If the Commission grants the Motion to Withdraw then it should make the following modifications to the PD:

2. Add that the scope of the Commission's review of the consolidated applications includes Section 706(a) of the 1996 Telecommunications Act and *Northern California Power Agency (NCPA) v. CPUC*. Under *NCPA v. CPUC*, the Commission is also required to make findings on the anti-competitive effects of the proposed transactions even if the Commission grants Joint Applicants' request to withdraw their applications.
3. Order the Joint Applicants to reimburse ORA for the costs of ORA's consultant, Dr. Lee L. Selwyn for the work done on the effects of the proposed merger on competition.
4. Recognize ORA's substantive analysis conducted on the Joint Applicant's service quality of broadband and voice communications.

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I. INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission's (CPUC or Commission) Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA) submits these comments on the Proposed Decision on the Motion to Withdraw Application to Transfer Control (PD). The Motion to Withdraw Application to Transfer Control (Motion to Withdraw) was filed by Comcast Corporation, Time Warner Cable Inc. Time Warner Cable Information Services (California), LLC (U6874C), Bright House Networks Information Services (California), LLC (U6955C), and Charter Fiberlink CA-CCO, LLC (U6878C) (hereinafter "Joint Applicants").¹

As an initial matter, ORA opposes granting the Motion to Withdraw without reaching the merits of the consolidated Applications (A.) 14-04-013, and A.14-06-012 of the Joint Applicants to determine if the transaction is in the public interest. Concentration in the communications marketplace is an ongoing issue of concern for the public, the State and the Commission, and is inconsistent with the 1996 Telecommunications Act's promise of competition from diverse providers. While *this* merger may no longer be a live issue at the federal level, the question of how this agency will consider future proposals that would result in consolidation in the industry *is* a live issue, as evidenced in the ongoing acquisition proceeding of Frontier and Verizon (A.15-03-005) and the recently filed merger application of Time Warner Cable, Charter Communications and Bright House Networks.

What is before us now is a PD Granting Joint Applicants' Motion to Withdraw. ORA files these comments recommending several amendments to the PD which would clarify the analysis that did occur in this docket, which is almost certain to be repeated in future dockets.

First, the PD inaccurately describes the scope of the Commission's review. The Commission reviewed the proposed transaction under Public Utilities Code Section 854, Section 706(a) of the 1996 Telecommunications Act (Section 706(a)) and *Northern California Power Agency (NCPA) v. CPUC*.² It is imperative that the Commission clarify its authority to review transactions that impair competition in the broadband marketplace, or raise barriers to entry.

¹ The term "Joint Applicants" also includes Charter Communications and Time Warner Cable (TWC), Inc.

² 5 Cal. 3d 370 (1971).

Broadband *is* the telecommunications network of the future, and Section 706(a) is the surest source of this Commission's authority to promote competition in that marketplace.

Jurisdictional matters at issue in the pending applications have also been raised in other telecommunications matters, for example the Service Quality, LifeLine and Verizon/Frontier acquisition proceedings.³ It would be inefficient and a substantial waste of Commission resources for parties to start from square one and re-litigate jurisdictional issues that have been fully developed and briefed here. Given the extensive and completed work by parties and policymakers in this proceeding, it would be beneficial for both the Commission and the parties for the PD to provide guidance in other proceedings on these jurisdictional questions fully briefed and litigated in these consolidated proceedings.

Furthermore, under *NCPA v. CPUC*, the Commission must review the anti-competitive harms in every proceeding before it and is required to make findings on those anti-competitive effects even if the Commission grants the Joint Applicants' request to withdraw their applications.⁴

ORA also requests that the Commission order the Joint Applicants to reimburse ORA for the costs of its consultant, Dr. Lee L. Selwyn for his work on the effects of the proposed merger on competition and recognize ORA's substantive analysis conducted on the Joint Applicants' service quality of broadband and voice communications.

II. DISCUSSION

A. The PD Inaccurately Describes the Scope of the Commission's Jurisdiction in this Matter

The PD fails to include that the scope of the proceeding falls under the Commission's authority pursuant to Section 706(a). Pages 3, 4, and 15 of the PD contain a summary of the parties' positions with regard to jurisdictional issues, specifically Section 706(a). However, in summarizing the Scoping Memo of these consolidated proceedings, the PD provides:

³ Service Quality Rulemaking, R.11-13-001; LifeLine Rulemaking, R.11-03-013; Verizon/Frontier Acquisition Proceeding, A.15-03-005.

⁴ *NCPA v. CPUC*, 5 Cal. 3d at 377-378, 486.

Based on arguments by intervenors and Joint Applicants, the Scoping Memorandum set the scope of the proceeding to include all issues relevant to the proposed merger's impacts on California consumers in order to inform this Commission's comments with the FCC, and determine whether any conditions should be placed upon a merged entity. The issues included, but were not limited to the following: an analysis of the criteria enumerated in Pub. Util. Code § 854(c); the implications of the merger for broadband deployment in California; and the public interest impact of the merger such as safety and reliability, consumer protection, build-out, service quality, verifiable efficiencies, and competition.⁵

This discussion of the Scoping Memo is inaccurate. In fact, pages 10 to 12 of the Scoping Memo contain a detailed description of the Commission's regulatory authority under Section 706(a), and the Scoping Memo concludes:

Therefore, the scope of the Commission's current review of the Merger between Comcast and TWC, as stated in this Ruling, falls within the limited authority granted under Pub. Util. Code § 854 and Section 706(a) of the Telecommunications Act.⁶

Furthermore, both the Proposed Decision Granting with Conditions Application to Transfer Control (PD Approving the Merger), and the Alternate Proposed Decision Denying Application to Transfer Control (APD Denying the Merger) reiterated and affirmed the Scoping Memo's finding that the Commission has regulatory authority pursuant to Section 706(a) to review the impact of the proposed merger on broadband and VoIP services. For example, both the PD Approving the Merger and APD Denying the Merger state:

We have reviewed the proposed merger under the authority of the California Public Utilities Code (Pub. Util. Code) § 854, and the limited delegated authority granted under Section 706(a) of the 1996 Telecommunications Act, to determine whether the merger is in the public interest. We have determined that Section 706(a) of the 1996 Telecommunications Act and § 854(a) and (c) apply to this transaction.⁷

The PD Approving the Merger and the APD Denying the Merger also provide that "[t]he scope of this proceeding is governed by Pub. Util. Code §§ 851-856 and Section 706(a) of the 1996

⁵ PD at 15.

⁶ Scoping Memo at 12 (emphasis added).

⁷ PD Approving Merger at 2; APD Denying the Merger language at 2.

Telecommunications Act”⁸ and contain further detailed discussion of the Commission’s jurisdiction under Section 706(a), as well as throughout the proposed decision.² Furthermore, Conclusions of Law 4 and 5 of the PD Approving the Merger provides:

4. Section 706(a) of the 1996 Telecommunications Act, codified in 47 United States Code § 1302(a) is a grant of authority to the Commission to examine the implications of the proposed merger of the parent companies on broadband deployment in California and to impose pro-competitive conditions that enhance broadband deployment, especially to schools, libraries and underserved communities.

5. The authority granted to the Commission by Section 706(a) of the 1996 Telecommunications Act satisfies the requirement of express delegation under federal law set out in § 710 of the Pub. Util. Code.¹⁰

The APD Denying the Merger contains similar conclusions of law.¹¹

As a practical matter, without the authority of Section 706(a), parties and Commission staff likely would have received little, if any, of the discovery about competition in the broadband marketplace, discovery which allowed the assigned ALJ in the PD Approving the Merger and Commissioner Florio in the APD Denying the Merger to conclude that the combined entity would be the *only* provider of high-speed (25 Mbps or higher) broadband in approximately 78% of census blocks in the combined service territories of Comcast and TWC in California.¹²

Despite all this, the PD neglects to discuss that the scope of the proceeding is also governed by Section 706(a). Although both the PD Approving the Merger and APD Denying the Merger have not been adopted by the Commission because the Joint Applicants filed the Motion to Withdraw, the scope and standard of review of the consolidated applications discussed in these two documents is germane to the discussion in the PD concerning the Commission’s scope of review in these proceedings.

⁸ PD Approving the Merger at 11; APD Denying the Merger at 12.

² PD Approving the Merger at 18-21; APD Denying the Merger at 20-24.

¹⁰ PD Approving the Merger at 86-87, Conclusions of Law 4-5.

¹¹ APD Denying the Merger at 84, Conclusions of Law 4, 5.

¹² See e.g., PD Approving the Merger at 61, 65, 66, 86 (Finding of Fact 15); APD Denying the Merger at 41, 64, 72, 83 (Finding of Fact 12).

The PD also fails to mention *NCPA v. CPUC*. Under this case, the CPUC is *required* to review the anti-competitive harms in every proceeding before it and is *required* to make findings on those anti-competitive effects, *whether or not the merger applicants request to withdraw their applications* and *whether or not the CPUC has explicit antitrust jurisdiction*.¹³ While the California Supreme Court issued *NCPA v. CPUC* 44 years ago, it remains good law and has been cited to and relied upon numerous times in other decisions and cases,¹⁴ as the PD Approving the Merger and the APD Denying the Merger note.¹⁵ For example, in *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*, D.99-02-085, the Commission held:

We are also legally obligated to consider the reasonableness of the utility's negotiations as they affect competition. Northern California Power Agency v. Public Util. Com., 5 Cal.3d 370, 379-381 (1971) provides that the Commission must take into account the antitrust aspects of applications before it, by a balancing test which places "the important public policy in favor of free competition in the scale along with the other rights and interests of the general public." (Id.) Under Northern California Power Agency, the Commission should undertake this obligation whether or not it is raised by a party.¹⁶

ORA requests that the PD also include *NCPA v. CPUC* in the list of legal authority under which this Commission may evaluate both the broadband and VoIP aspects of the proposed merger and that the CPUC make findings on the anti-competitive effects of the proposed merger in the PD, consistent with *NCPA v. CPUC*.¹⁷

¹³ *NCPA v. CPUC*, 5 Cal. 3d at 377-378, 486.

¹⁴ For example, in *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*, D.99-02-085, the Commission held: "We are also legally obligated to consider the reasonableness of the utility's negotiations as they affect competition. Northern California Power Agency v. Public Util. Com., 5 Cal.3d 370, 379-381 (1971) provides that the Commission must take into account the antitrust aspects of applications before it, by a balancing test which places "the important public policy in favor of free competition in the scale along with the other rights and interests of the general public." (D.99-02-085, 1999 Cal. PUC LEXIS 33, 85 CPUC2d 158).

¹⁵ See PD Approving the Merger at 36-43, 60-69; APD Denying the Merger at 19.

¹⁶ *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*, D.99-02-085, 1999 Cal. PUC LEXIS 33, 85 CPUC2d 158.

¹⁷ *NCPA v. CPUC*, 3 Cal. 3d at 380.

B. The PD Fails to Address and Grant ORA's Request that the Joint Applicants Reimburse ORA for the Costs of its Consultant

In their Response to Joint Applicants' Motion to Withdraw, Joint Intervenors,¹⁸ including ORA, requested that if the Commission grants Joint Applicants' Motion to Withdraw, then as a condition of withdrawal, the Joint Applicants be required to pay for the costs of ORA's expert, Dr. Lee L. Selwyn, for his detailed and important work in these proceedings.¹⁹

As noted in the Joint Intervenors' Response to Motion to Withdraw, ORA expended significant financial resources on an expedited and emergency basis in order to bring in an expert to conduct a comprehensive competition analysis of the proposed transactions. Both the PD Approving the Merger, and the APD Denying the Merger heavily relied on the analysis contained within Dr. Selwyn's Expert Report and Declaration, and it is clear that the Commission benefitted from the analysis that Dr. Selwyn provided.²⁰

ORA has a statutory obligation to advocate on behalf of residential and small commercial investor-owned utility customers in order to ensure that they receive the "lowest possible rate for service consistent with reliable and safe service levels."²¹ The Scoping Memo in these consolidated proceedings asked parties, including ORA, to determine whether the merger is in the public interest and whether the merger would result in less competition in the California marketplace for broadband customers as compared to broadband customers nationally.²² In order to fulfill its statutory obligations, ORA hired an expert to conduct a competitive analysis of the proposed merger; this is not expertise that ORA has in-house. By hiring an expert consultant, ORA was better positioned to achieve its statutory mandate and to be responsive to the explicit goals in these proceedings to ensure the merger was in the public's best interest. Due in large part to Dr. Selwyn's efforts, ORA significantly contributed to the building of a robust record in these proceedings.

¹⁸ Joint Intervenors are ORA, The Utility Reform Network (TURN), The Greenlining Institute (Greenlining), the Center for Accessible Technology (CforAT) and Media Alliance.

¹⁹ Joint Intervenors' Response to Motion to Withdraw at 5-6.

²⁰ See PD at 36-43, 6-69.

²¹ P.U. Code § 309.5(a).

²² Scoping Memo at 12-13.

The PD glosses over ORA's contributions to the record of these consolidated proceedings in the section titled "Intervenor Contributions to the Development of the Record." For example, the PD only generally references the enormous contribution that Dr. Lee L. Selwyn's 182 page declaration made to the record of the proceeding. Indeed, both the PD Approving the Merger and APD Denying the Merger heavily relied on Dr. Sewlyn's competition analysis.²³ Furthermore, the PD does not even mention ORA's contribution to the analysis of the impact of the proposed merger on service quality in section 2.3.5. titled "Parties Contributions to Service Quality." Yet ORA conducted an in depth analysis on service quality, including filing two declarations on voice and broadband service quality, and its brief contained a detailed discussion and metrics of the Joint Applicant's service quality for both broadband and voice communications.²⁴ In addition, both the PD Approving the Merger, and the APD Denying the Merger heavily relied on and reference the service quality analysis conducted by ORA.²⁵

Because Joint Applicants filed a Motion to Withdraw and demand that the Commission not issue a decision on the merits in these proceedings, and because ORA's consultant substantially contributed to create a rich record in the consolidated proceedings, fairness requires the Joint Applicants to pay for the full contract cost of ORA's expert, Dr. Lee L. Selwyn. This is a typical arrangement in merger and acquisition proceedings. For example, in the recent Frontier acquisition of Verizon, the applicants agreed to pay for the costs of ORA's consultant. ORA reached the same arrangement in the Verizon/MCI and AT&T/SBC mergers as well. In this case, Joint Applicants have not agreed to reimburse ORA for the costs of its consultant; the Commission should order the Joint Applicants to cover those costs.

Furthermore, mergers and acquisitions are difficult to anticipate and plan for, especially from a budgetary perspective, and there was significant pressure placed on ORA and other parties to follow a schedule that would lead to a Commission decision before the FCC reached a decision on the matter. The state contracting process is not conducive to bringing in an outside expert on an unplanned emergency and expedited basis. The prospect of Comcast, Time Warner

²³ PD Approving the Merger at 11, 36-39, 61, 73.

²⁴ A.14-04-013 & A.14-06-012, ORA Legal Brief, Exhibit 2 (Declaration of Dr. Ayat Osman) and Exhibit 3 (Declaration of Adam J. Clark)

²⁵ PD Approving the Merger at 47-49 and APD Denying the Merger at 50-52.

Cable and Charter agreeing to reimbursement upfront was low and because of the tight timelines in the consolidated proceedings, time was of the essence for ORA to get its expert on board.

C. The Record in this Proceeding Needs to Be Preserved

ORA supports the PD's determination that the record in these consolidated proceedings needs to be preserved. Since the Joint Applicants formally requested to withdraw their merger applications at the CPUC, two of the Joint Applicants, Time Warner Cable and Charter, have revoked Commission staff's, ORA's, the Greenlining Institute's and TURN's access to their responses to the FCC's Requests for Information (FCC Responses), and the CPUC and other parties will likely lose access to the Comcast FCC Responses shortly. It is important that the Commission preserve all records in its proceedings, and the FCC Responses are records that were used and relied upon by parties and the Commission in these proceedings. For these reasons, ORA supports the PD's order that Comcast, Time Warner and Charter "provide to the Commission and ORA a full and complete set of the FCC Responses on hard drives or CDs in a format that is readable and usable with standard software, such as Adobe Acrobat."²⁶

D. One Non-Substantive Clarification

ORA notes that on page 23 of the PD, ORA is referred to by its prior name, DRA. This should be corrected.

III. CONCLUSION

ORA recommends amending the PD to include a discussion on the merits of the proposed merger and related transaction. However, if a decision on the merits does not issue, ORA proposes the following modifications contained herein. It is critical for the Commission to clearly state that it had jurisdiction to review the proposed merger under Section 706(a). The Commission should also acknowledge that it is required to review the anti-competitive effects of the consolidated applications in the PD, and make the appropriate findings of facts regarding those anti-competitive effects under *NCPA v. CPUC*. Equity mandates that the Commission order the Joint Applications to reimburse ORA for the costs for its consultant, Dr. Lee L. Selwyn. Lastly, the PD's discussion on service quality should include and recognize the in depth work conducted by ORA. Appendix A sets forth ORA's proposed additional Finding of Facts, Conclusions of Law and Ordering Paragraph.

²⁶ PD at 12.

Respectfully submitted,

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Appendix A

Proposed Findings of Facts, Conclusions of Law & Ordering Paragraph

Proposed Finding of Facts:

12. The Expert Report and Declaration of ORA's consultant, Lee L. Selwyn, substantially contributed to the record of these proceedings.

13. Under traditional market analysis, market power is usually measured in terms of concentration, or market share. This is a statistical analysis using the Herfindahl-Hirschman Index (HHI) which calculates the sum of the squares of each firm's market share.

14. ORA presented calculations of the HHI with respect to the concentration of the market for fixed broadband. This analysis showed that the HHI was already highly concentrated before the merger, and becomes more highly concentrated as a result of the Comcast acquisition.

15. As of June 30, 2014, according to the California Broadband Availability Database, 76.6 percent of households and 78 percent of census blocks in Joint Applicants' territory will have no other competitors for broadband service at download speed tiers greater than or equal to 25 Mbps.

16. Post-merger, Comcast would serve 84 percent of the households in California.

17. The merged company will have enhanced ability to compete for the provision of backhaul services to customers that operate in both northern and southern California.

18. The anti-competitive effects of the merger will hinder broadband development in California in that it will substantially increase Comcast's market power to exclude, degrade, and/or make more expensive and less attractive edge provider content that subscribers demand.

Proposed Conclusions of Law:

7. Section 706(a) of the 1996 Telecommunications Act, codified in 47 United States Code § 1302(a) is a grant of authority to the Commission to examine the implications of the proposed merger of the parent companies on broadband deployment in California.

8. The authority granted to the Commission by Section 706(a) of the 1996 Telecommunications Act satisfies the requirement of express delegation under federal law set out in Public Utilities Code Section 710(a).

9. Under *Northern California Power Agency (NCPA) v. CPUC*, 5 Cal. 3d 370 (1971), the Commission must review the anti-competitive harms of these consolidated applications and make findings on those anti-competitive effects.

Proposed Ordering Paragraph:

7. The Joint Applicants shall reimburse ORA for the full contract price of its consultant, Lee L. Selwyn.